

different viscosities, combinations of organosiloxanes and cyclic silicones, and polyorganosiloxane resins.

A-3

33. (Amended) A composition according to claim 1 further comprising at least one additive chosen from C<sub>10</sub>-C<sub>18</sub> 1,2-alkanediols and fatty alkanolamides derived from monoethanolamine, C<sub>10</sub>-C<sub>18</sub> 1,2-alkanediols and fatty alkanolamides derived from diethanolamine, silicone sunscreens, non-silicone sunscreens, cationic surfactants, anionic polymers, nonionic polymers, amphoteric polymers, proteins, protein hydrolysates, ceramides, pseudoceramides, fatty acids comprising at least one chain chosen from linear and branched C<sub>12</sub>-C<sub>40</sub> chains, 18-methyleicosanoic acid, hydroxy acids, vitamins, provitamins, panthenol, plant oils, animal oils, mineral oils and synthetic oils.

## REMARKS

### Status of the Claims

Claims 1-44 are pending. Claims 1-12, 14, 16-22, and 30-36 have been examined. Claims 13, 15, 23-29, and 37-44 have been withdrawn from consideration as not reading on the elected invention. Claims 30 and 33 have been amended to more particularly point out and distinctly claim that which the inventors regard as their invention. The specification has also been amended to clarify the definition of "fatty acid soap." Support for the amendment to the specification can be found at, e.g., page 2, lines 30-31 of the French language priority document. Support for the amendment to claims 30 and 33 can be found in the originally filed disclosure. These amendments are not intended to narrow the scope of the claims. Accordingly no new matter is added by these amendments.

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**Incorporation by Reference**

While stating that Applicants' incorporate by reference various publications, foreign patents, and foreign applications, the Examiner contends that such incorporation is improper because "[t]he material is considered to be essential because it refers to embodiments of the invention rather than mere background." (Office Action, page 4.) The Examiner has also requested that "Applicant is required to amend the disclosure to include the material incorporated by reference." *Id.* As explained below, Applicants respectfully submit that the material incorporated by reference into Applicants' specification is properly incorporated.

The *Manual of Patent Examining Procedure* ("MPEP") defines "essential material" as "that which is necessary to (1) describe the claimed invention, (2) provide an enabling disclosure of the claimed invention, or (3) describe the best mode (35 U.S.C. 112)." MPEP § 608.01(p)(l)(A). The material incorporated by reference from the cited foreign documents is well known in the art and is generally cited merely to provide non-limiting examples of certain ingredients. The Examiner has not established that this material can be properly regarded as "essential material" as that term is defined in the MPEP. The MPEP further provides that "[a] patent need not teach, and preferably omits, what is well known in the art." MPEP. § 2164.01 (citation omitted). Applicants' specification complies with this mandate. Accordingly, Applicants submit that the material noted by the Examiner is properly incorporated by reference.

**Double Patenting**

The Examiner has advised Applicants that "should claim 1 be found allowable, claims 35 and 36 will be objected to under 37 CFR 1.75 as being a substantial duplicate

thereof." (Office Action, page 4.) Without acquiescing to the Examiner's reasoning, Applicants understand the Examiner's comments to mean that any objection of the claims under 37 CFR 1.75 will be deferred until the indication of allowable subject matter.

**Rejections Under 35 U.S.C. § 112, Second Paragraph**

Claims 1-12, 14, 16-22, and 30-36 have been rejected under 35 U.S.C. § 112, second paragraph, for allegedly failing to particularly point out and distinctly claim that which Applicants regard as the invention. Applicants respectfully traverse each of these rejections in view of the reasons discussed below.

With respect to the definiteness of claim language requirement under 35 U.S.C. § 112, Applicants note that "[t]he essential inquiry pertaining to this requirement is whether the claims set out and circumscribe a particular subject matter with a **reasonable degree** of clarity and particularity." MPEP § 2173.02 (emphasis added). In other words, under Section 112, the focus is on "whether the claim meets the threshold requirements of clarity and precision, not whether more suitable language or modes of expression are available." *Id.* The MPEP also states that:

Definiteness of claim language must be analyzed, not in a vacuum, but in light of:

- (A) The content of the particular application disclosure;
- (B) The teachings of the prior art; and
- (C) The claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made.

*Id.* In view of these principles, Applicants respectfully submit that, for at least the reasons discussed below, the claims meet the requirements for clarity and precision under 35 U.S.C. § 112.

Claims 1, 35, and 36 have been rejected for allegedly "being vague and confusing due to the phrase 'fatty acid soaps.'" (Office Action, page 5.) According to the Examiner, "it is unclear ... how salts of alkali metals, for example NaCl, could constitute a 'fatty acid soap.'" *Id.* Applicants respectfully traverse this rejection by noting that no inconsistency exists in classifying certain salts of alkali metals as "fatty acid soaps." Indeed, Applicants' specification, as amended, states that "the expression 'fatty acid soap' refers to a salt of an alkali metal or of an alkaline-earth metal or of a fatty amine and of a C<sub>10</sub>-C<sub>18</sub> fatty acid." Applicants' assert that no ambiguity exists with respect to the meaning of the terms "fatty acid soap" as defined in the amended specification, and, therefore, respectfully request that this rejection be withdrawn.

Claims 1, 35, and 36 have also been rejected for allegedly "containing improper Markush groups due to the definition of R" which is defined by the phrase 'which may be identical or different, are each chosen from a hydrogen atom, and alkyl groups comprising from 1 to 18 carbon atoms.'" (Office Action, page 5.) According to the Examiner, "[t]he definition of R" is indefinite in the use of the term 'comprising' which renders the structure of R" ambiguous." *Id.* Applicants respectfully traverse this rejection. In this regard, Applicants note that there is no requirement to use Markush-type language in claims.

According to the MPEP:

Alternative expressions are permitted if they present no uncertainty or ambiguity with respect to the question of the scope or clarity of the claims. One acceptable form of alternative expression, which is commonly referred to as a Markush group, recites members as being "selected from the group consisting of A, B and C."

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MPEP § 2173.05(h) (citations omitted). Here the MPEP clearly indicates that a Markush group is “[o]ne acceptable form of alternative expression,” nowhere is it submitted that Markush-type language is the **only** acceptable language. Instead, the guiding principle is that “[a]lternative expressions are permitted if they present no uncertainty or ambiguity with respect to the scope or clarity of the claims.” *Id.* Applicants respectfully submit that claims 1, 35, and 36 do not present any uncertainty or ambiguity simply because of their use of the word “comprising.” The term “comprising” has a well-defined meaning in patent claims and is understood as being “inclusive or open-ended and does not exclude additional, unrecited elements or method steps.” MPEP § 2111.03. Moreover, the use of the term “comprising” in the context of claims 1, 35, and 36 is unambiguous. For example, one of ordinary skill in the art would appreciate that “alkyl groups comprising from 1 to 18 carbon atoms” can comprise from 1 to 18 carbon atoms as well as additional elements or constituents not expressly recited in the claim. For these reasons, Applicants respectfully request withdrawal of this rejection.

Claim 12 has been rejected due to the term “derivatives.” (Office Action, page 6.) According to the Examiner, “[t]he metes and bounds of this claim are unclear, rendering the claim indefinite.” Applicants respectfully traverse this rejection and submit that the claim, including the terms “quaternary cellulose ether derivatives,” sets out the subject matter of the invention with a reasonable degree of clarity and particularity, especially when read in light of Applicants’ specification. While this specification in no way limits the scope of Applicants’ claims, it does reasonably apprise those skilled in the art of the scope of the invention, including the meaning of the terms “quaternary cellulose ether

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derivatives." (See Specification page 16, lines 12-18). Accordingly, Applicants respectfully request that this 35 U.S.C. §112 rejection be withdrawn.

Claim 30 has been rejected due to the term "polydimethylsiloxaness." (Office Action, page 6.) Applicants have amended claim 30 to instead recite "polydimethylsiloxanes." Accordingly, Applicants respectfully request that this rejection be withdrawn.

Claim 33 has been rejected due to the phrase "from from." (Office Action, page 6.) Applicants have amended claim 33 to instead recite "from." Accordingly, Applicants respectfully request that this rejection be withdrawn.

Claim 33 has been rejected for allegedly "being confusing in listing further additives that may include fatty acids." (Office Action, page 6.) According to the Examiner, "the inclusion of fatty acids would appear to be inconsistent with Claim 1 from which Claim 33 depends, which states the proviso that the compositions be free of fatty acid soaps." *Id.* Applicants respectfully traverse this rejection by noting that no inconsistency exists between the recitation in claim 1, "wherein said composition is free of fatty acid soaps," and the recitation in claim 33 that the composition of claim 1 "further compris[es] at least one additive chosen from ... fatty acids." The specification, as amended, states that "as used herein, the expression 'fatty acid soap' refers to a **salt of an alkali metal or of an alkaline-earth metal or of a fatty amine and of a C<sub>10</sub>-C<sub>18</sub> fatty acid."** Therefore, in view of the amendment to the specification, Applicants respectfully request that this rejection be withdrawn.

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**Rejections Under 35 U.S.C. § 103**

Claims 1-10, 19-22, 30-32, and 35-36 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,001,334 to Villa et al. ("Villa") in view of U.S. Patent No. 5,482,704 to Sweger et al. ("Sweger"). According to the Examiner, "Villa teaches liquid cleansing compositions including liquid shower gel compositions." (Office Action, page 7.) The Examiner further states that "comparative examples include sodium laureth sulfate (an alkyl ether sulfate), dimethicone (a polydimethylsiloxane with trimethylsilyl end groups), and Carbopol®." *Id.* The Examiner acknowledges, however, that "[t]he reference lacks the use of amphoteric starches as claimed." *Id.*

Sweger, according to the Examiner, "teaches the use of amphoteric starches including the claimed species in cosmetic compositions." *Id.* The Examiner also states that "Sweger teaches that Cepa-starch replacing Carbopol® had the best skin feel and appearance" and that "Sweger teaches that Cepa-starch is superior to Carbopol® with regard to separation of layers and viscosity." *Id.* According to the Examiner, "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the compositions of Villa by the substitution of Cepa-starch for Carbopol® as taught by Sweger in order to benefit from the improved properties of Cepa-starch as compared to Carbopol® as taught by Sweger." *Id.* Applicants respectfully traverse this rejection.

Applicants note that in order to make out a prima facie case of obviousness the Examiner bears the burden of establishing that: (1) there is a suggestion or motivation to modify reference teachings, (2) there is a reasonable expectation of success in such a

combination, and (3) the prior art references when combined teach or suggest all claim limitations. Moreover, “[t]he teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant’s disclosure.” MPEP § 2143 (citations omitted). Here, Applicants maintain that the Examiner has not met this initial burden because at least two of these criteria have not been established.

Specifically, there is no motivation to modify the teachings of Villa with the disclosure found in Sweger so as to obtain Applicants’ claimed invention. Applicants’ invention is directed to, *inter alia*, “[a] cosmetic composition comprising, in a cosmetically acceptable aqueous medium, a washing base and at least one amphoteric starch ... wherein said composition is a detergent and conditioning composition, and wherein said composition is free of fatty acid soaps” (see Claim 1). Villa, in contrast, is directed to “a liquid cleansing composition comprising: (1) ... a surfactant system; (2) ... a beneficial agent of defined particle size; (3) ... xanthan gum; and (4) ... a cross-linked polyacrylic acid polymer.” Villa, col. 2, lines 6-22. Nowhere in Villa is there any mention of amphoteric starches, let alone any teaching or suggestion that its disclosed compositions would be advantageously affected by the addition of amphoteric starches. Hence, for this reason alone Villa fails to teach or suggest Applicants’ claimed cosmetic composition.

The disclosure of Sweger does not remedy the deficiencies of Villa. Sweger is directed to “cosmetic compositions which contain amino-multicarboxylate starch derivatives. Sweger, col. 1, lines 34-35. Nowhere in Sweger is there any teaching or suggestion that its disclosed, modified starch compositions would be desirable additives to the compositions of Villa. Indeed, in contrast to Villa, which is directed to “a liquid

detergent composition" (Villa, col. 2, lines 30-31), Sweger fails to even mention detergent compositions, and certainly fails to suggest combining its disclosed compositions with detergent compositions, let alone the compositions of Villa.

In addition, Example II of Sweger does not support the Examiner's assertion that Sweger teaches that "Cepa-starch is superior to Carbopol®." In that example, Sample A contained 2.0 wt% of Cepa-starch whereas Control 2, to which it was compared, contained only 0.5 wt% of Carbopol 940. Sweger, col. 8, lines 1-34. Control 2 also contained a secondary emulsifier, which was absent in Sample A. *Id.* Hence, given the differences in concentration between Cepa-starch and Carbopol® in the compositions of Example II, as well as other differences in those compositions, Applicants respectfully submit that Sweger's conclusions regarding Cepa-starch and Carbopol® do not extend beyond the limited conditions of that example and certainly cannot be extrapolated to other compositions not even disclosed or suggested by Sweger.

Moreover, there is certainly no motivation from the references to substitute any starch compositions disclosed in Sweger for Villa's disclosure of Carbopol®, as suggested by the Examiner. Villa, instead, teaches that cross-linked polyacrylic polymers, such as Carbopol®, are **essential** to the practice of his invention. For example, Villa states:

Suddenly and unexpectedly, applicants have found that when xanthan gum and cross-linked polyacrylic acid polymer saturated compounds ... are used in the specified surfactant system of the invention, they stably suspend large benefit agent particles. **By contrast, when xanthan gum or cross-linked polyacrylic acid is used alone, the benefit agent cannot be suspended without separation.**

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Villa, col. 1, line 65 - col. 2, line 5 (emphasis added). In other words, Villa teaches that the object of his invention is to "stably suspend large benefit agent particles" and that in order to achieve this object, xanthan gum and cross-linked polyacrylic acid polymer saturated compounds, such as Carbopol®, must be used in combination. *Id.*

In view of Villa's teachings, Applicants note that "[i]f proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." MPEP § 2143.01 (citations omitted). Here, removal of cross-linked polyacrylic polymers, such as Carbopol®, would render the Villa compositions unsatisfactory for their intended purpose. Consequently, Villa teaches away from the modification proposed by the Examiner. Hence, for this and the other reasons discussed above, one of ordinary skill in the art would not be motivated to combine the teachings of Villa with the disclosure of Sweger so as to obtain Applicants' claimed invention.

In addition to the lack of motivation to modify or combine reference teachings in order to obtain Applicants' claimed cosmetic composition, the cited references fail to demonstrate a reasonable expectation of success for making such a combination. Here, Neither Villa nor Sweger provide any direction or guidance which would allow one of ordinary skill in the art to successfully modify the Villa compositions so as to obtain Applicants' claimed invention. Thus, for this additional reason, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) over Villa in view of Sweger be withdrawn.

Claims 1-12, 14, 16-18, and 35-36 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 5,720,964 to Murray in view of

Sweger. According to the Examiner, Murray "teaches hair conditioning compositions" and "further teaches the use of Carbopol®." (Office Action, page 8). The Examiner acknowledges, however, that "[t]he reference lacks the use of amphoteric starches as claimed." *Id.*

As noted above, the Examiner states that "Sweger teaches the use of amphoteric starches including the claimed species in cosmetic compositions." *Id.* According to the Examiner, "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the compositions of Murray by the substitution of Cepa-starch for Carbopol® as taught by Sweger in order to benefit from the improved properties of Cepa-starch as compared to Carbopol® as taught by Sweger." *Id.* Applicants respectfully traverse this rejection.

Applicants maintain that the Examiner has not met the initial burden of establishing a *prima facie* case of obviousness because at least two of the criteria, discussed above, have not been met. Specifically, there is no motivation to modify the teachings of Murray with the disclosure found in Sweger so as to obtain Applicants' claimed invention. In contrast to Applicants' claimed invention, Murray is directed to "a hair conditioning shampoo composition compris[ing]: (a) ...anionic surfactant, (b) ... water, (c) ... an emulsion polymerised dimethiconol nonionic conditioning polymer ..., and (d) ... a cationic deposition polymer." Murray, col. 1, lines 45-59. Nowhere in Murray is there any mention of amphoteric starches, let alone any teaching or suggestion that its disclosed compositions would be advantageously affected by the addition of amphoteric starches. Hence, for this reason alone Murray fails to teach or suggest Applicants' claimed cosmetic composition.

The disclosure of Sweger does not remedy the deficiencies of Murray. Nowhere in Sweger is there any teaching or suggestion that its disclosed, modified starch compositions would be desirable additives to the compositions of Murray. In addition, for the reasons discussed above, Example II of Sweger does not support the Examiner's assertion that Sweger teaches that "Cepa-starch is superior to Carbopol®."

Moreover, no motivation exists to substitute any starch compositions disclosed in Sweger for Murray's disclosure of Carbopol®, as suggested by the Examiner. Murray teaches that Carbopol® is used in his disclosed compositions as a "silicone suspending agent." Murray, col. 4, lines 38-58. Neither reference teaches or suggests that any of the amphoteric starches disclosed in Sweger would, likewise, serve as a suitable "silicone suspending agent" as required by Murray. Hence, for this and the other reasons discussed above, one of ordinary skill in the art would not be motivated to combine the teachings of Murray with the disclosure of Sweger so as to obtain Applicants' claimed invention.

In addition to the lack of motivation to modify or combine reference teachings in order to obtain Applicants' claimed cosmetic composition, the cited references fail to demonstrate a reasonable expectation of success for making such a combination. Here, neither Murray nor Sweger provide any direction or guidance which would allow one of ordinary skill in the art to successfully modify the Murray compositions so as to obtain Applicants' claimed invention. Thus, for this additional reason, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) over Murray in view of Sweger be withdrawn.

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Claims 1 and 33-34 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 5,919,438 to Saint-Leger in view of Sweger. According to the Examiner, Saint-Leger "teaches dermatological/cosmetic compositions" and that, in those compositions, "Carbopol® 980 is used as a thickener" (Office Action, page 9.) The Examiner acknowledges, however, that "[t]he reference lacks the use of amphoteric starches as claimed." *Id.*

As noted above, the Examiner states that "Sweger teaches the use of amphoteric starches including the claimed species in cosmetic compositions." *Id.* According to the Examiner, "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the compositions of Saint-Leger by the substitution of Cepa-starch for Carbopol® as a thickener as taught by Sweger in order to benefit from the improved properties of Cepa-starch as compared to Carbopol® as taught by Sweger." *Id.* Applicants respectfully traverse this rejection.

Applicants maintain that the Examiner has not met the initial burden of establishing a *prima facie* case of obviousness because at least two of the criteria, discussed above, have not been met. Specifically, there is no motivation to modify the teachings of Saint-Leger with the disclosure found in Sweger so as to obtain Applicants' claimed invention. In contrast to Applicants' claimed invention, Saint-Leger is directed to "dermatological/cosmetic compositions comprising at least one antifungal agent and at least one halogenated antibacterial agent, other than those of the genera macrolide and pyranoside, and to topical applications thereof for the reduction of hair loss." Saint-Leger, col. 1, lines 13-17. Nowhere in Saint-Leger is there any mention of amphoteric starches, let alone any teaching or suggestion that its disclosed compositions would be

advantageously affected by the addition of amphoteric starches. Hence, for this reason alone Saint-Leger fails to teach or suggest Applicants' claimed cosmetic composition.

The disclosure of Sweger does not remedy the deficiencies of Saint-Leger. Nowhere in Sweger is there any teaching or suggestion that its disclosed, modified starch compositions would be desirable additives to the compositions of Saint-Leger. In addition, for the reasons discussed above, Example II of Sweger does not support the Examiner's assertion that Sweger teaches that "Cepa-starch is superior to Carbopol®."

Moreover, no motivation exists to substitute any starch compositions disclosed in Sweger for Saint Leger's disclosure of Carbopol®, as suggested by the Examiner. For example, neither reference teaches or suggests that any of the amphoteric starches disclosed in Sweger would serve as suitable thickeners in the compositions of Saint-Leger, especially given Saint Leger's specific objective of reducing hair loss via a composition comprising "at least one antifungal agent and at least one halogenated antibacterial agent." *Id.* Hence, for this and the other reasons discussed above, one of ordinary skill in the art would not be motivated to combine the teachings of Saint-Leger with the disclosure of Sweger so as to obtain Applicants' claimed invention.

In addition to the lack of motivation to modify or combine reference teachings in order to obtain Applicants' claimed cosmetic composition, the cited references fail to demonstrate a reasonable expectation of success for making such a combination. Here, neither Saint-Leger nor Sweger provide any direction or guidance which would allow one of ordinary skill in the art to successfully modify the Saint-Leger compositions so as to obtain Applicants' claimed invention. Thus, for this additional reason, Applicants

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respectfully request that the rejection under 35 U.S.C. § 103(a) over Saint-Leger in view of Sweger be withdrawn.

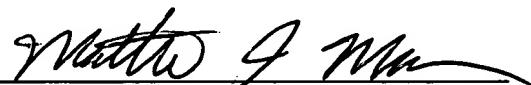
In view of the foregoing remarks, Applicants respectfully request the reconsideration of this application and submit that all pending claims are in a condition for allowance.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Dated: April 15, 2002

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## APPENDIX

In accordance with 37 C.F.R. §1.121(b) and (c), Applicants set forth the paragraph beginning on line 17 of page 3 of the specification and claims 30 and 33 in marked up form. Underlined text indicates additions to the claim, and [square brackets] enclose deletions.

### Specification

(The paragraph beginning on line 17 of page 3)

As used herein, the expression "fatty acid soap" refers to a salt[s] of an alkali metal[s, salts] or of an alkaline-earth metal[s,] or of a fatty amine[s] and of a C<sub>10</sub>-C<sub>18</sub> fatty acid[s].

### Claims

30. A composition according to claim 19, wherein said at least one silicone is chosen from polyalkylsiloxanes comprising trimethylsilyl end groups, polyalkylsiloxanes comprising dimethylsilanol end groups, polyalkylarylsiloxanes, combinations of polydimethylsiloxanes[s] comprising at least one gum and at least one oil of different viscosities, combinations of organosiloxanes and cyclic silicones, and polyorganosiloxane resins.

33. A composition according to claim 1 further comprising at least one additive chosen from C<sub>10</sub>-C<sub>18</sub> 1,2-alkanediols and fatty alkanolamides derived from monoethanolamine, C<sub>10</sub>-C<sub>18</sub> 1,2-alkanediols and fatty alkanolamides derived from [from] diethanolamine, silicone sunscreens, non-silicone sunscreens, cationic surfactants, anionic polymers, nonionic polymers, amphoteric polymers, proteins, protein hydrolysates, ceramides, pseudoceramides, fatty acids comprising at least one chain

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chosen from linear and branched C<sub>12</sub>-C<sub>40</sub> chains, 18-methyleicosanoic acid, hydroxy acids, vitamins, provitamins, panthenol, plant oils, animal oils, mineral oils and synthetic oils.

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